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BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

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In the Matter of	)	
Revisions to Cable Television Rate Regulations	)	MB Docket No. 02-144
	)	
Implementation of Sections of The Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation	)	MM Docket No. 92-266 MM Docket No. 93-215
	)	
Adoption of a Uniform Accounting System for the Provision of Regulated Cable Service	)	CS Docket No. 94-28
	)	
Cable Pricing Flexibility	)	CS Docket No. 96-157

To: The Commission

COMMENTS OF COX COMUNICATIONS, INC.

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Cox Communications, Inc. ("Cox" or the "Company"), by its attorneys and pursuant to Sections 1.415 and 1.419 of the Commission's rules, 47 C.F.R. §§ 1.415, 1,419, hereby submits these Comments regarding the above-captioned matter.'

INTRODUCTION AND SUMMARY

During the nearly ten years since the Commission adopted its cable television rate regulations, the cable industry has undergone dramatic changes. Since 1992, the multichannel video program distribution ("MVPD") market has become robustly competitive, and what were nascent technologies such as direct broadcast satellite ("DBS") and high-definition television

1 Revisions to Cable Television Rate Regulations, *Notice of Proposed Rulemaking and Order*, __ FCC Rcd __, FCC 02-177 (released June 19, 2002), 67 Fed. Reg. 56882 (Sept. 5, 2002); ***Order***, __ FCC Rcd __, FCC 02-228 (released August 14, 2002), **67** Fed. Reg. 56880 (Sept. 5,2002) (collectively hereinafter, the "*NPRM*").

("HDTV") have evolved or are evolving into thriving businesses. Indeed, in 1996, just four years after passage of the 1992 Cable Act, Congress was persuaded by the new competitive dynamic to lessen government oversight of the cable industry[2] by, among other things, deregulating prices charged for cable programming service tiers ("CPSTs").[3] These key intervening legal, marketplace, and technological developments, plus experience gained with the Commission's rate rules over the years, all militate in favor of minimizing certain regulations that frankly have outlived their usefulness and have imposed undue burdens on cable operators and the Commission.

Cox therefore wholeheartedly supports the Commission's decision to revisit and revise its rate regulations to better reflect current marketplace realities. Cox agrees that the focus of the Commission's efforts should be on "mechanical and procedural changes to the existing rules and forms"[4] rather than the establishment of a new regulatory scheme. Given that competition is firmly entrenched in the video programming marketplace, it would be pointless for the Commission to attempt to reinvent the wheel at this juncture. Rather, revisions to existing rate regulations should be consistent with the principles articulated in the 1992 Cable Act[5] and the Commission's initial rate regulation proceeding; namely, (i) "to reduce administrative burdens on subscribers, cable operators, franchising authorities, and the Commission";[6] (ii) to "ensure that

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2 The Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996) (the "1996 Telecommunications Act"); *see* Implementation of the Cable Act Reform Provisions of the Telecommunications Act of 1996, *Report and Order*, 14 FCC Rcd 5296 (1999) ***("Cable Act Reform Order")***.

3 *See* 47 U.S.C. § 543(c)(4).

4 *NPRM* at para. 3.

5 The Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460 (1992) (the "1992 Cable Act").

6 47 U.S.C. § 543(b)(2)(A).

cable operators continue to expand, where economically justified;[7] and (iii) to “rely on the marketplace, to the maximum extent feasible”[8] to achieve these objectives,

Despite the Commission’s best intentions and diligent efforts, its existing cable rate regulations are quite complicated, and all too often have led to extended and burdensome administrative proceedings.[9] Cox consequently believes that the Commission should, wherever possible, simplify and streamline its existing rate regulations in a manner that is fair to both cable operators and their customers. Given today’s robust competitive environment, the Commission should also eliminate rules and policies that disrupt cable operators’ legitimate marketing and business activities and thereby place them at an unfair disadvantage *vis á vis* their unregulated MVPD competitors.

With these fundamental principles in mind, Cox urges the Commission to:

- Deregulate the installation and lease of customer premises equipment whose primary purpose is the provision of advanced services;
- Clarify that the “Mark-Up” method adopted in the *Second Order on Reconsideration* applies to the addition and deletion of all regulated services;
- Treat rate adjustments for the addition and deletion of digital broadcast services under the same rules applicable to analog services;
- Presume that cable operators are subject to effective competition in any state where DBS penetration exceeds fifteen percent of occupied households;

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7 1992 Cable Act, § 2(b)(3), 106 Stat. 1463

8 *Id.*, § 2(b)(2), 106 Stat. 1463

9 Notwithstanding the sunset of CPST regulation in March 1999 and exceptional efforts by the Commission’s staff both before and since, the Commission has only recently completed processing pending CPST rate complaints from the October 1993 through March 1999 period and has yet to resolve all the pending petitions for reconsideration or applications for review. Moreover, even under the best circumstances, the Commission does not issue initial orders resolving appeals of LFA rate proceedings in less than one year.

- Clarify that strict historical linkage in the unbundling of equipment costs no longer is required;
- Allow cable operators to recover equipment and installation revenues lost as a result of unreasonable local franchising authority ("LFA") rate orders through a temporary add-on to the basic service tier ("BST") rate similar to that used to recover network upgrade costs;
- Provide specific directions to LFAs when reversing unreasonable BST rate orders; and
- Clarify that charges for customer initiated changes in service are unregulated.

In addition to the issues raised in the *NPRM*, Cox also suggests that the Commission implement the following mechanical and procedural revisions to its existing rules, which "logically follow from the changed scope of regulation and intervening developments subsequent to the adoption of the initial rules":[10]

- Delete the reference to "cable programming service" in Section 76.984(a) of the rules and clarify that the uniform rate structure rule is inapplicable to the now unregulated CPST;
- Include as an "external cost" under Section 76.922(f) of the rules the pole attachment fees that cable operators are forced to incur for the provision of rate-regulated cable services or, at the very least, those pole attachment fees remitted to municipal and cooperative electric utilities, which are exempt from the protections afforded to cable operators and telecommunications providers under the Pole Attachment Act, 47 U.S.C. § 224; and
- Clarify that the Commission intends to retain the bill itemization rule.

[10] *NPRM* at para. 3

DISCUSSION

I. Equipment and Inside Wiring Rate Regulation.

A. The Commission Should Deregulate the Installation, Lease, and Sale of Subscriber Premises Equipment Whose Primary Purpose is the Provision of Digital, HDTV, and Unregulated Services.

Cox agrees that the regulatory, technological and competitive changes that have occurred since the Commission adopted its equipment and installation rate regulations warrant a fresh look at the Commission's expansive reading of the statutory phrase "used by subscribers to receive the basic service tier."[11] The fundamental issue facing the Commission is whether cable operators will be allowed the flexibility to compete with DBS providers and other unregulated competitors in the marketing and deployment of advanced customer premises equipment. As the *NPRM* implicitly recognizes, the Commission is in a position to provide the public with the benefits of competition while ensuring reasonable rates for BST customers by exempting from rate regulation equipment whose primary purpose is the provision of digital and advanced premium services.[12] Cox submits that the Commission can achieve this goal simply by allowing cable operators the discretion to offer the lease, sale, and installation of equipment capable of providing digital and HDTV services at unregulated rates. Giving cable operators such flexibility will enable them to determine how best to accelerate the deployment of advanced services and equipment.

As noted in the *NPRM*, the 1992 Cable Act contemplated that some equipment used by cable customers would be associated primarily with tiers other than the BST. Nonetheless, the Commission initially adopted an expansive reading of regulated BST equipment "even though it resulted in virtually no equipment coming within the CPST tier equipment definition."[13] The

[11] 47 U.S.C. § 543(b)(3)(A). See *NPRM* at para. 46.

[12] *NPRM* at paras. 46-48.

[13] *Id.* at para. 45.

Commission reached this determination in part because "[a]lthough [the Commission] believe[d] that Congress intended [its] regulations to encourage a competitive market in the provision of equipment and service installation . . . [the Commission did] not have the information [it] would need to establish an effective competition test for equipment and installation at [that] time."[14]

Much has changed over the intervening years. DBS operators offering all-digital services and equipment have become a ubiquitous competitive alternative *to* cable operators throughout the nation." In response, cable operators have made enormous investments to upgrade their systems and introduce digital service tiers, which require the use of advanced equipment that is unnecessary for receiving the standard BST or CPST. In addition, the *1996* Telecommunications Act and the Commission's regulations have laid the groundwork for a fully competitive market for the provision of all cable television customer premises equipment.[16] In today's environment, therefore, to achieve the Commission's goal of "encouraging a competitive market in the provision of equipment[,]"[17] cable operators should be given the flexibility to market advanced digital equipment in competition with, and on the same terms as, their unregulated competitors.

Cox submits that advanced digital equipment should be treated similarly to the unregulated, advanced digital services that it is designed to deliver. The Commission has recognized in other contexts that regulation becomes unnecessary where competition is present to ensure that rates and terms of service remain reasonable. For example, the Commission has

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14 Implementation of Sections of the Cable Television Consumer Protection and Competition Act of *1992:* Rate Regulation, *Report and Order and Further Notice of Proposed Rulemaking*, *8* FCC Rcd 5631, 5806 at para. *286 (1993)("Rate Order").*

15 *See infra* Section IV; Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, *Eighth Annual Report, 17* FCC Rcd *1244,1247,1272-74 (2002)("Eighth Competition Report").*

16 *See 47* U.S.C. *§ 549;* Implementation of Section *304* of the Telecommunications Act of *1996,* Commercial Availability of Navigation Devices, *Report and Order, 13* FCC Rcd *14775* (1998), *petitions for review deniedsub nom. General Instrument Corp. v. FCC*, 213 F.3d *274* (D.C. Cir. *2000).*

17 *Rate Order, 8* FCC Rcd at *5806,* para. *286.*

exempted from regulation a cable operator's offering of an inside wire maintenance plan covering both cable television and telephone inside wiring where competition is present for such services." The Commission also exempted "New Product Tiers" from regulation due to competition from regulated CPSTs.[19] Today, cable operators' offerings of advanced digital customer premises equipment compete directly with the nearly identical equipment and services offered by their DBS competitors, and will soon compete with similar equipment offered by third-party national retailers. This competition ensures that the rates for leasing, selling, and installing such equipment will remain reasonable in the absence of regulation.

Given this marketplace environment, cable operators should be permitted the discretion to offer and market the provision and installation of advanced digital customer premises equipment at unregulated rates if they elect not to include the costs of such equipment on FCC Form 1205.[20] In particular, operators should have the discretion to establish regulated rates for some advanced equipment while offering other types of such equipment at market-based rates. In a competitive environment, it is cable operators, not government regulators, who can best determine how to price advanced digital equipment in response to local consumer demand,

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[18] Request for Clarification of Rate Regulatory Rules: Inside Wire Maintenance, *Memorandum Opinion and Order,* 16 FCC Rcd 2198 (2001).

[19] Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation, *Sixth Order on Reconsideration, Fifth Report and Order, and Seventh Notice of Proposed Rulemaking,* 10 FCC Rcd 1226,1234-39 at paras. 22-37 (1994) *("Sixth Reconsideration Order"), aff'd Adelphia Communications Corp. v. FCC,* 88 F.3d 1250 (D.C. Cir. 1996).

[20] Granting operators greater flexibility to price and package advanced equipment also will benefit the analog-only customer by permitting cable operators to exclude high-cost equipment from the FCC Form 1205 ratebase used to calculate regulated rates for analog converter and remote control equipment. Because costs associated with the substantially more expensive advanced digital equipment may be aggregated and averaged in broad equipment categories pursuant to the Commission's equipment aggregation rules, exclusion of such advanced equipment from the operator's regulated ratebase on FCC Form 1205 will, all other things being equal, keep rates low for analog converter and remote control equipment. *See* Implementation of Section 301(j) of the Telecommunications Act of 1996, Aggregation of Equipment Costs By Cable Operators, *Report and Order,* 11 FCC Rcd 6778 (1996); 47 C.F.R. § 76.923(c)(1).

Operators are also developing devices for new advanced services such as home networking that have little or no relationship to traditional video services. The Commission should confirm that such devices are beyond the scope of rate regulation.

11. Rate Adjustments When Channels are Added or Deleted From the BST.

A. The Commission Should Re-Affirm its Determination in the *Sixth Order on Reconsideration* that the "Mark-Up" Methodology of Adjusting Regulated Rates for the Addition and Deletion of Programming Services Applies to All Regulated Channel Changes Implemented After December 31,1997.

A critical issue in this proceeding concerns the manner in which rates should be computed for the addition and deletion of programming services on regulated tiers. This issue has created much confusion and uncertainty for both LFAs and cable operators over the past five years. Although the Commission's temporary rules governing such rate adjustments expired on December 31, 1997, an inadvertent error in the codification of the rules failed to reflect the Commission's explicit instruction to reinstate Section 76.922(e) as it existed prior to adoption of the *Sixth Order on Reconsideration.*[21] To correct this error, the Commission should adhere to its previous determination that the Mark-Up method should be used to adjust the non-external portion of regulated rates to account for the addition or deletion of regulated services for all such changes beginning January 1, 1998. Unlike the other alternatives presented in the *NPRM*, the Mark-Up methodology should continue to be used because it: (i) is simple; (ii) is well understood by cable operators and LFAs; (iii) imposes relatively few administrative burdens on cable operators, LFAs, and the Commission; and (iv) is fair to both cable operators and their customers. The sunset of CPST regulation provides no persuasive reason for the Commission to reverse course, and, as demonstrated herein, the concerns articulated in the *NPRM* will be fully addressed by implementing the Commission's earlier decision.

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[21] *See Sixth Reconsideration Order,* 10 FCC Rcd at 1260, para. 98. The Commission's rule as it existed prior to the *Sixth Reconsideration Order* is attached hereto as Exhibit 1 and the rule in effect subsequently is attached hereto as Exhibit 2.

To be fair to both cable operators and their subscribers, whatever method the Commission chooses should result in the same non-external rate adjustment regardless of whether programming services are being added to or deleted from the regulated **BST.** Cox submits that the interim rule announced in paragraph 55 of the *NPRM* (the "Interim Order") should not be made final because it will result in substantial rate reductions when regulated services are removed from the BST but only miniscule rate adjustments when the same services are added. The unfairness of this approach is best illustrated by example. Pursuant to the terms of a local franchise agreement, a cable operator may be required to activate a channel for public, educational, or governmental ("PEG) use that is later returned and deleted from the operator's BST channel line-up when insufficient programming is available to sustain the PEG channel. Under the rule announced in the Interim Order, the operator would be permitted a $0.01 rate increase when the programming is added to the BST (assuming more than forty-six regulated channels), but would be required to reduce its rate by between $0.30 and $0.50 when that same programming later is deleted from the BST. At the end of the day, therefore, the operator would be required to substantially reduce its rate even though its customers would be receiving the *same* services and even though the operator's costs remained unchanged. The Commission should avoid this fundamentally unfair result.

Cox submits that a review of the Commission's extensive cable rate regulation proceedings conclusively demonstrates that the rule announced in the *Second Reconsiderution Order,* which the Commission ordered reinstated in the *Sixth Reconsideration Order,* properly balances the interests of cable operators and their customers in the current environment where only BST rates may be regulated. The existing rules adopted in the *Second Reconsideration Order* also result in fewer administrative burdens for operators, LFAs, and the Commission than the other alternatives discussed in the *NPRM,* and therefore comport more closely with the congressional policies underlying the Commission's rules. The Commission consequently should clarify that the rules adopted in the *Second Reconsideration Order*[22] govern rate adjustments for both the addition *and* deletion of BST services,

(1) The History of the Commission's Cable Rate Regulation Proceeding Demonstrates that the Mark-Up Methodology Adopted in the *Second Reconsideration Order* Should be Used for the Addition and Deletion of Regulated Services.

As explained in detail in the Historical Appendix attached hereto, the Commission specifically determined in the *Sixth Reconsideration Order* that, as of January 1, 1998, the interim rules it adopted for the addition, deletion, and movement of regulated programming services — including the Caps methodology for adding new CPST programming services and the associated rule for calculating the non-external, or "residual," portion of the regulated rate for purposes of shifting programming services between regulated service tiers — would be replaced by the pre-existing Mark-Up methodology adopted in the *Second Reconsideration Order*.[23] As noted above, however, due to an error in the codification of the Commission's rules, the pre-existing rules adopted in the *Second Reconsideration Order* were not reinstated as the Commission intended, Instead, the codification of the Commission's rules literally eliminated *any* methodology for adjusting rates to reflect the addition and deletion of programming services from regulated tiers.[24] Unfortunately, this oversight has resulted in confusion and unnecessary administrative burdens for both LFAs and cable operators.[25]

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[22] Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation, *Second Order on Reconsideration, Fourth Report and Order, and Fifth Notice of Proposed Rulemaking,* 9 FCC Rcd 4119 (1994) *("Second Reconsideration Order"); see* Exhibit 1.

[23] *See* Historical Appendix and Exhibit 1, attached hereto; *Sixth Reconsideration Order,* 10 FCC Rcd at 1260, para. 98.

[24] *See* 47 C.F.R. § 76.922(g)(8) (2001).

[25] For example, certain LFAs have claimed that operators were not entitled to non-external cost adjustments to account for the addition of BST channels required by law or contract, such as "must-carry" television broadcast stations required by Section 614 or 615 of the Communications Act and public, educational, and governmental ("PEG') channels required under local franchises or franchise renewal agreements. Similarly, the void in the Commission's rules also suggests that *(continued. ..)*

The Commission's temporary rule, which expired December 31, 1997, permitted a non-external rate adjustment of, *e.g.*, between $0.01 and $0.03 for the addition of a new BST programming service (assuming more than thirty regulated channels), but required between approximately a $0.30 to $0.50 adjustment if an existing BST programming service were deleted or moved to the then-regulated CPST. In contrast, the Commission's pre-existing Mark-Up methodology would result in the same non-external rate adjustment regardless of whether programming services were added or deleted. The Commission's interim methodology for adjusting regulated rates to account for the movement of channels between regulated tiers made at least some sense in 1994, given: (i) the context of the new interim Caps methodology where both the BST and the CPST were subject to rate regulation; (ii) Commission policies that were designed to provide an incentive to add programming services to the CPST rather than the BST; and (iii) a need to ensure that the operator's regulated residual costs and Caps method adjustments were accurately distributed between tiers when programming services were moved between regulated BSTs and CPSTs. In the current environment, however, where the BST is the only tier subject to regulation and intervening changes in technology and competition have dramatically altered the MVPD market, continuing to maintain the Commission's ***Sixth Reconsideration Order*** methodology, as suggested by the alternative set forth in paragraph 20 of the *NPRM* and in the Interim Order,[26] is inconsistent with the Commission's previously established decisions and produces anomalous results. The Commission accordingly should clarify that the pre-existing rule applies to the non-external price adjustment for the addition and deletion of channels on all regulated service tiers (except for the deletion of "Caps" channels

(. . . continued)
BST channels may be deleted without making a non-external cost adjustment to the regulated BST rate. The problem becomes particularly acute for cable operators and LFAs attempting to calculate BST rates for systems that re-tier a formerly single-tier offering into a separate BST and CPST.

[26] *NPRM* at para. 55, as amended by ***Order,*** __ FCC Rcd __, FCC 02-228 (released August 14, 2002), **67** Fed. Reg. 56880 (Sept. 5,2002).

from single-tier systems, which should reflect the actual per-channel adjustment taken when such channels were added to the operator's channel line-up).[27] This is substantially similar to the methodology proposed in paragraph 19 of the *NPRM*.

(2) The Commission Should Adopt a Modified Form of the Proposal Set Forth in Paragraph 19 of the *NPRM*.

Cox fully supports many of the policy objectives regarding the addition and deletion of regulated services outlined in the *NPRM*, including: (1) to provide operators with an appropriate return on investment in facilities and programming services; (2) to ensure that subscribers only pay for the services they receive; and (3) to reflect the fact that the unit cost of a channel declines as the total capacity of the system increases.[28] Cox also believes the Commission should affirm two unstated but implied policy objectives, namely: (i) to simplify wherever possible the Commission's rate regulations and reduce burdens on cable operators and franchising authorities; and (ii) to avoid any rules that would disrupt cable operators' otherwise valid marketing and business decisions.

Cox submits that each of these policy objectives can be achieved simply by implementing the Commission's previous determination to reinstate the Mark-Up method for adjusting regulated rates to reflect the addition or deletion of programming services. The Mark-Up methodology is superior to the other alternatives suggested in the *NPRM* because it is simple and well understood by cable operators and LFAs and because — byrequiring the same non-external per-channel adjustment for both additions and deletions — it is fair to both cable operators and their customers. Moreover, reinstatement of the Mark-Up methodology will impose the fewest

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[21] To reflect the Commission's intent, operators would use FCC Form 1240, Worksheet 3, for the addition and deletion of BST channels implemented beginning January 1, 1998, except for "Caps" channels added to single-tier systems, which would continue to be accounted for in Worksheet 2, and would eliminate use of Worksheets 4 and 5. Similarly, operators would use FCC Form 1210, Module G for the addition and deletion of BST channels implemented beginning January 1, 1998, except for "Caps" channels added to single-tier systems, which would continue to be accounted for in Module F, and would eliminate use of Module H.

[28] *NPRM* at para. 17.

administrative burdens on cable operators, LFAs, and the Commission, and therefore is consistent with the policies underlying the 1992 Cable Act. The sunset of CPST regulation provides no reason for the Commission to reverse course in midstream.

Although the Mark-up method is the essence of the proposed approach outlined in paragraph 19 of the *NPRM*, the proposal suggests "identifying the specific amount of adjustment not by reference to the number of 'regulated channels' but by reference to the current number of channels that would be subject to regulation if CPST rate regulation had not ended."[29] The *NPRM* asserts that continuing to use the Mark-Up methodology without this alteration would be inappropriate because the Commission's benchmark rates were "derived from a study based on data from both BST and CPST channels combined and . . . reflect[] the declining price of channels as total channel capacity increases."[30] Cox understands the basis of the concern expressed in the *NPRM*. Cox, however, submits that implementing this alteration is unnecessary. Reference to a fictional number of channels that ***would*** be subject to regulation *if* the 1996 Telecommunications Act had not become law would have an insignificant impact in practical terms on many, if not most, of non-external rate adjustments because Section 76.922(g)(2) of the rules provides for an adjustment of $0.05 or less whenever the average number of regulated channels exceeds twenty-four.[31] In Cox's case, its systems carry an average of twenty-five BST channels. Moreover, because the benchmark curve results in larger per-channel adjustments as the number of regulated channels is reduced, cable subscribers would tend to receive greater rate reductions when programming services are removed from the BST using the Commission's original Mark-Up methodology than using the modified methodology suggested in paragraph 19.

29 *NPRM* at para. 19.

30 *Id.*

31 ***See*** 47 C.F.R. § 76.922(g)(2).

The *NPRM* also expresses concern that the modified Mark-Up methodology proposed in paragraph 19 "will have only a minimal impact on BST rates when channels are deleted."[32] This concern is misplaced because it fails to consider that the per-channel adjustments reflected in Section 76.922(g)(2) of the rules represent only the non-external, or "residual" portion of the regulated rate. A significantly larger rate reduction results from the required removal of marked-up external costs such as the license fees cable operators pay to programming providers and Caps method adjustments included in the rates of single-tier systems. Indeed, the restructuring of single-tier systems into a separate BST and CPST will be the most common scenario in which a substantial number of signals are removed from the regulated BST rate. The Mark-Up method, therefore, will have a significant impact on rates when channels are deleted that will be proportionate to the actual cost of providing the relevant regulated programming services to subscribers.

The remaining alternatives outlined in the *NPRM* should be rejected. The notion outlined in paragraph 18, that only external costs should be recognized when channels are added or deleted, is irreconcilable with the Commission's established policies, would ensure that no channels are voluntarily added to the BST, and would unfairly penalize operators who are required by law or contract to add "must-carry" or "PEG" programming to the BST. Similarly, no basis exists for the alternatives suggested in paragraph 20 of the *NPRM*. The Commission should not retroactively resurrect a methodology that it specifically determined to be inappropriate for use after December 31, 1997 and that requires grossly unbalanced rate adjustments depending upon whether regulated programming services are added or removed from the BST. As noted above, although that methodology may have been justified in 1994 to account for the movement of programming services between regulated BSTs and CPSTs in the context of the now defunct interim Caps channel addition methodology for CPSTs, it has no justification in the absence of the Caps methodology and where only the BST is regulated.

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[32] *NPRM* at para. 19

Finally, the Commission should not attempt to calculate a "residual" rate pursuant to the expired Caps channel movement and deletion rules[33] or to "establish new BST per-channel values through new benchmarks based on an updated comparison of BST rates charged by competitive and non-competitive systems."[34] Calculating a "residual" rate for an unregulated service under expired Section 76.922(g)(4)-(5) of the rules is impossible because the various segments of the regulated rate — *e.g.*, External, Residual, Caps, Mark-Up, Headend Upgrade, Inflation, True-Up, Channel Movement and Deletion — are both meaningless and unascertainable for unregulated programming services. Simply put, no per-program or tier "residual" can exist absent regulated rates for the subject services and tiers. Moreover, the notion that the Commission should undertake an entirely new benchmark survey of competitive and non-competitive BST rates when the video programming marketplace is so competitive would be completely misguided. Given the abundance of competitive forces to which cable operators are subjected, a massive retooling of the benchmark regime at this late stage of the game would be irreconcilable with the 1992 Act's policy of reducing administrative burdens and would also contradict the Commission's stated intention "to focus on mechanical and procedural changes to the existing rules and forms" in this proceeding.[35]

III. Digital Broadcast Television Rate Adjustment Issues.

A. The Commission's Rules Should Treat Rate Adjustments for the Addition and Deletion of all Regulated Programming Services Equally.

As observed in the NPRM, the Commission's policies regarding BST rate adjustments for digital broadcast services should ensure "that cable operators have sufficient incentives to add digital television signals, particularly during the transition from analog to digital service, that

33 47 C.F.R. § 76.922(g)(4)-(5).

34 *Id.* at para. 22.

35 *Id.* at para. 3.

subscribers should bear a fair share of the costs of providing service on the tier carrying digital signals relative to the system's overall capacity, and that subscriber rates be reasonable."[36] Cox believes, however, that the proposal set forth in the *DTV Must Carry* proceeding[37] — namely, to allow non-external rate adjustments only for each 6 MHz of cable system capacity devoted to carriage of digital broadcasts rather than for each regulated programming service[38] — would retard rather than accelerate realization of the Commission's goals.

The Commission should instead require that non-external rate adjustments for the addition or deletion of *all* regulated programming services be determined in accordance with the Mark-Up methodology adopted in the *Second Reconsideration Order,*[39] regardless of the technology used to transmit or receive those programming services.[40] Cable operators should be permitted a non-external rate adjustment for each digital broadcast programming service rather than for each 6 MHz of capacity devoted to carriage of digital signals.

This approach achieves each of the Commission's policy goals. Allowing cable operators a non-external cost adjustment for each digital broadcast programming service added to (or deleted from) their regulated tiers will provide an incentive to add digital television broadcast programming services and thereby fulfill the Commission's goal of accelerating the transition to digital television broadcasting.[41] And, as the Commission has recognized, "[b]ecause the cable

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36 *NPRM* at para. 26.

37 Carriage of Digital Television Broadcast Signals, *First Report and Order and Further Notice of Proposed Rulemaking*, 16 FCC Rcd 2598 (2001) ("*DTV Must Carry Order*").

38 *Id.*, 16 FCC Rcd at 2656-57, paras. 133-34.

39 *See* Exhibit 1, 47 C.F.R. § 76.922(e)(1) (1994).

40 As suggested in the *DTV Must Carry Order,* this may entail a revision to how "channels" are counted in this context. 16 FCC Rcd at 2657, para. 134 ("We also seek comment on how channels should be counted in light of the sunset of CPST rate regulation.").

41 The Commission's policies recognize that "cable operators should have incentives to add digital television broadcast programming, particularly where operators carrying a broadcast station's analog signal during the transition period must assign spectrum to accommodate digital signals." *Id.* The Commission has also recognized that "maximizing the introduction of digital

(continued. . .)

industry operates in an increasingly competitive environment . . . subscribers who purchase digital programming, including digital broadcast programming, should bear a fair share"[42] of the costs associated with providing that programming. Indeed, there is no reason to treat digital broadcast programming services any differently than all other programming services carried on that tier. The modest non-external rate adjustment permitted for each channel under the Mark-Up method will ensure that subscriber rates remain reasonable. Furthermore, the Mark-Up method is simple, well-understood by cable operators and LFAs, and, in contrast to the proposal set forth in the *DTV Must Carry Order,* will require no changes to the Commission's rate calculation forms. Therefore, application of the Mark-Up methodology to each programming service, rather than devising a wholly new methodology to compensate cable operators for each 6 MHz of capacity devoted to the carriage of digital broadcast programming, will not only serve to accelerate the transition to digital broadcasting, but will provide a stable and certain regulatory environment and will "reduce administrative burdens on subscribers, cable operators, franchising authorities, and the Commission"[43] in accordance with congressional policies

B. The Commission Should Provide Cable Operators with Flexibility Regarding Recovery of Headend Equipment Costs Necessary for Carriage of DTV Signals.

Cox supports the Commission's proposed clarification in paragraph 25 of the *NPRM* that cable operators are permitted to recover the costs of purchasing and installing headend equipment necessary for carriage of DTV signals either as an external cost pursuant to Section 76.922(f)(1)(vii) of the Commission's rules or as a network upgrade cost under Section 76.922(j)(1). Cox believes, however, that the Commission should allow operators the flexibility

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(. . . continued)
broadcast television" serves "a number of statutory and public policy goals inherent in Section 614 and 615, and other parts of the Act." *Id.* at para. 4.

42 *Id.*, 16 FCC Rcd at 2657, para. 134.

43 47 U.S.C. § 543(b)(2)(A).

to elect either methodology at any time; in other words, operators should not be restricted from switching between recovery methodologies, just as operators are permitted to switch between the Commission's quarterly and annual rate adjustment methodologies.[44]

Although the Commission theoretically allowed cable operators to recover such expenditures as external costs in the *DTV Must Carry* **Order:'** it did not amend its rate forms (FCC Forms 1240 *or* 1210) to facilitate that recovery. The Commission therefore should amend the description of Line 708 in FCC Form 1240, Worksheet 7, to reflect "DTV Headend Equipment Costs For Period' and eliminate the current reference to "Commission Regulatory Fees For Period."[46] DTV headend equipment costs should be amortized over the useful life of the equipment in a manner similar to that of analogous franchise related costs. In the alternative, the Commission may wish to consider allowing all operators, rather than only small systems, to use Worksheet 6 of FCC Form 1240 (Headend Upgrade) to perform this calculation, although this methodology may require more extensive revisions to the Commission's rules and rate forms.

IV. Effective Competition Showings.

Nowhere is the need to consider the intense competition that has developed in the MVPD market more compelling than in the Commission's procedures and rules regarding effective competition showings, During the past ten years, the number of DBS subscribers has increased from zero to more than nineteen million by July 2002.[47] The success of the DBS operators has been felt in communities across the country. **As** the Commission noted in the *NPRM*, as of June

[44] *See* 47 C.F.R. § 76.922(c)(3).

[45] *DTV Must Carry Order*, 16 FCC Rcd at 2646-47, paras. 109-110.

[46] The Commission's regulatory fees are passed-through directly to subscribers in the same manner as franchise fees and should not affect an operator's true-up calculation, which is the effect of reflecting such fees in Worksheet 7. Indeed, most cable operators exclude regulatory fees from their FCC Form 1240 filings for precisely this reason.

[47] According to SkyTrends, as of July 2002, there were 19,091,795 satellite subscribers nationwide. See http://www.skyreport.com/dth_counts.shtm (last visited October 11,2002).

2001 (more than a full year ago), "DBS penetration. . . exceed[ed] 20% of television households in 30 states and 30% in five states."[48] By April 2002, "direct to home penetration exceeded 15 percent in 44 states, 20 percent in 36 states, 25 percent in 22 states, 30 percent in seven states and 40 percent in one state."[49] Nationwide, by June 2001, DBS operators controlled more than 18.2% of the entire MVPD market" and by June 2002 that control had risen to more than 19.2%.[51]

Obviously, today's competitive landscape is significantly different than the one in existence when Congress enacted the 1992 Cable Act and when the Commission promulgated its effective competition procedures and regulations. Today, Cox and every other cable operator fights fiercely with their powerful DBS competitors not only to serve every new customer, but also to continue serving every existing customer.[52] Inasmuch as *the* fundamental assumption underlying the rate regulation and effective competition provisions of the 1992 Cable Act and the Commission's rules was a dearth of competition to cable television systems,[53] the time has come

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48 *NPRM* at para. 53, citing *Eighth Competition Report,* 17 FCC Rcd 1244, 1273 at para. 58.

49 Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, MB Docket No. 02-145, *Comments of the National Cable and Telecommunications Association* at 13 (filed July 29, 2002) ("*NCTA Comments").*

50 *Eighth Competition Report,* 17 FCC Rcd at 1247, para. 8.

51 *NCTA Comments* at 12.

52 Both the Commission and the Cable Services Bureau have acknowledged that the presence of a large and powerful competitor "can have a competitive impact on a cable operator" even before the competitor "finishes installing its plant or rolling out its service.'' *Cable Act Reform Order,* 14 FCC Rcd at 5303-04, para. 11 (footnote omitted) (citing *Time Warner Entertainment-Advance/Newhouse Partnership and Paragon Communications,* 12 FCC Rcd 3143 (Cab. Serv. Bur. 1997); *Comcast Cablevision of the South,* 13 FCC Rcd 1676 (Cab. Serv. Bur. 1997)). Inasmuch as DBS service is offered and is available nationally and has captured a substantial share of the MVPD market, it obviously has had a competitive impact on all cable television operators.

53 In 1993, the Commission justified its regulatory presumption of no effective competition by reference to the congressional finding that substantial MVPD competition had yet to develop by 1992. "As Congress recognized in crafting the Act, the vast majority of cable systems today are not subject to effective competition." *Rate* Order, 8 FCC Rcd at 5670, para. 43 (footnote

(continued. . .)

for the Commission to take a fresh look at its current presumption that cable operators do not face effective competition in their local markets.[54] Specifically, the Commission should acknowledge the present-day reality that cable operators in fact face intense competition from the DBS industry, especially where state-wide DBS penetration exceeds the fifteen percent statutory threshold.[55] As the National Cable and Telecommunications Association has previously proposed, the Commission accordingly should reverse its presumption that cable operators are not subject to effective competition, at least for franchise areas located in states where DBS penetration exceeds fifteen percent.[56]

Cox suggests the following procedure to implement this conditional presumption of effective competition, Operators offering service in states where DBS penetration exceeds fifteen percent should be permitted to submit a petition to the Commission for one or more franchise areas within that state, which attaches SkyTrends or other equivalent documentation demonstrating that DBS penetration in the relevant state exceeds fifteen percent (15%) of occupied households. The operator would be required to serve the petition on all affected certified LFAs. If an affected LFA chooses not to oppose the petition within thirty (30) days, the cable operator would be deemed to face effective competition in that franchise area. Any affected LFA within the state opposing the operator's petition within the thirty (30) day period should be required to demonstrate a lack of effective competition within its franchise area using the same data and information that cable operators routinely use now to demonstrate the existence of effective competition. The operator should then have an opportunity to reply to the opposition pursuant to the Commission's existing rules. To ensure that LFAs are not unduly

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omitted, citing 1992 Cable Act, § 2(a)(2); H.R. REP. NO. 102-628 at 29-30 ("[C]able's competitors serve, in the aggregate, fewer than 5 percent of American households.")).

54 *See* 47 C.F.R. § 76.906.

55 *See* 47 U.S.C. § 543(*l*)(1)(B)(ii).

56 *NCTA Comments* at 13, n.23.

burdened in obtaining information regarding DBS competition in their franchise areas, the Commission should simply amend Section 76.907(c) of the rules[57] — which requires competitive distributors to provide timely information regarding the extent of their service in the franchise area at their own expense — to include LFAs as well as cable operators. Cox submits that this procedure is consistent with the statute and with the Commission's determination establishing the use of presumptions for effective competition showings. Moreover, this procedure will reduce administrative burdens on cable operators, LFAs, and the Commission while ensuring reasonable MVPD rates.

Finally, given the ubiquitous national competition of DBS operators, the Commission also should streamline the effective competition process even where operators are unable (or choose not) to take advantage of the proposed "fifteen percent state-wide penetration test" outlined above. For example, in light of sustained national advertising campaigns that include direct mail, television, radio, newspaper, billboard, and telemarketing, cable operators should be relieved of the requirement to demonstrate consumer awareness of DBS availability in the operator's franchise area. Similarly, the Commission should take official notice that DBS providers offer comparable programming and that DBS is offered to more than fifty percent of households in the operator's franchise area. In today's competitive market, the Commission can safely remove these unnecessary administrative burdens and also presume consumer awareness, comparable programming, and the offering of DBS service throughout all cable franchise areas.

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[57] 47 C.F.R. § 76.907(c).

V. Unbundling.

A. The Commission Should Clarify that the Primary Purposes in Reviewing FCC Form 1205 are to Determine Whether Current Equipment and Installation Charges are Reasonable and Whether the Operator's Methodology is Consistent with its Previous Filing.

Another issue that has caused confusion and regulatory uncertainty among both cable operators and LFAs is the continued relevance of the Commission's initial rules regarding the "unbundling" of regulated service and equipment costs in the wake of the legal and regulatory changes that have occurred since adoption of the Commission's rate regulations. The Commission consequently should reduce undue administrative burdens on cable operators and clarify that strict historical linkage in the "unbundling" of equipment costs no longer is required unless: (1) an LFA can convincingly assert that the cost in question was or was not unbundled when initial regulated rates were established, and (2) the LFA previously did not have an opportunity to raise such concerns. In light of the equipment aggregation provisions of the statute and the Commission's rules, as well as settled expectations regarding previously approved regulated rates, cable operators should not be required to shoulder the practically insurmountable burden of demonstrating that each and every cost reflected in its current FCC Form 1205 filing was properly unbundled almost ten years ago. This is especially the case where: (i) the current filing is consistent with the operator's previous filing or filings that the LFA approved; (ii) the operator's filing includes data from multiple franchise areas in accordance with the equipment aggregation provisions of Section 623(a)(7) of the Communications Act[58] and Section 76.923(c)(1) of the Commission's implementing rules;[59] or (iii) the LFA is initiating BST rate regulation for the first time.

Several compelling practical reasons militate against requiring cable operators to revisit unbundling issues that are almost a decade old. First, assembling the material necessary to

[58] 47 U.S.C. § 543(a)(7).

[59] 47 C.F.R. § 76.923(c)(1)

understand a particular system's initial unbundling is extraordinarily difficult so many years after initial regulated rates were established. Information simply is not available, particularly because a very large percentage of cable systems have changed ownership during this period. And obtaining such information will only become more difficult in the years ahead.

Second, under the Commission's equipment aggregation process,[60] the direct link between service and equipment rates in any given community has become extremely attenuated. Prior to equipment aggregation, certain costs may have been unbundled in one community but not in another. Pursuant to the 1996 Telecommunications Act and the Commission's rules, however, both communities may now be reflected in the aggregated FCC Form 1205 filing. Given this reality, the burdens associated with rigid adherence to the FCC's unbundling rules far outweigh any public interest benefit. No practical way exists to prepare an aggregated Form 1205 that perfectly tracks every unbundling decision made for the affected cable systems, particularly because different systems with different original owners and unbundling methodologies may now be combined and averaged in a single Form 1205 filing.

Third, on a practical level, efforts expended on ensuring unbundling consistency over the past decade are ill-spent. The impact on consumers, if any, is likely to be minimal. There is simply no evidence that operators deliberately left cost components bundled into service rates in the early days of rate regulation. Moreover, with rapidly increasing digital equipment costs, operators often establish rates for equipment well below their MPRs. Therefore, the administrative burden imposed on cable operators, LFAs, and the Commission by requiring strict historical linkage far outweighs any marginal potential benefit subscribers might receive.

Fourth, purported unbundling concerns may easily be misused to deny an otherwise properly justified rate filing. If an LFA truly believes that the operator has abused the unbundling process, the proper course should be to file an "evasion" complaint with the

[60] 47 C.F.R. § 76.923(c)(1).

Commission and demonstrate to the Commission's satisfaction that the operator deliberately manipulated the process so as to evade regulatory restraints.

At the onset of rate regulation, the Commission concluded in the *Rate Order* that pursuant to the congressional mandate to regulate equipment and installation rates based on actual cost it "should require the complete unbundling of the charges for equipment and installation."[61] Under the benchmark methodology the Commission adopted for determining initial regulated rates, "the benchmark rates are equipment-bundled averages . . . . [and] [o]nce the proper benchmark rate for full recovery of cable services costs and equipment is determined for a system, the operator's equipment portion is unbundled based on its actual cost for installation and customer equipment."[62] Consequently, the Commission's methodology established a reciprocal relationship between program rates and equipment rates in the initial regulated rate calculation where "higher equipment costs resulted in lower programming rates, and lower equipment costs resulted in higher programming rates."[63]

As noted in the *NPRM*, in 1994 this reciprocal relationship led to concerns regarding practices that may, under certain circumstances, have constituted evasions of the rules in connection with initial regulated rates.[64]

> For instance, operators cannot now charge for services previously provided without extra charge (e.g., routine service calls, program guides) unless the value of that service, as now reflected in the new charges, was removed from the base rate number when calculating the reduction in rates necessary to establish reasonable rates.[65]

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61 *Rate Order, 8* FCC Rcd at 5810, para. 288.

62 *Suburban Cable TV, Inc.*, 13 FCC Rcd 13111 at para. 9 (Cab. Serv. Bur. 1997).

63 *Comcast Cablevision of Detroit, Inc.*, 15 FCC Rcd 24022 at para. 30 (Cab. Serv. Bur. 2000).

64 *NPRM* at para. 40

65 Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation, Buy-Through Prohibition, *Third Order on Reconsideration,* 9 FCC Rcd 4316,4365 at para. 135 (1994) *("Third Reconsideration Order").*

The Commission's cases have reached varying conclusions, however, with regard to the issue of whether this reciprocal relationship extends beyond the initial rate filing. On one hand, the Commission has held that cable operators are prohibited from including pre-existing costs in subsequent FCC Form 1205 filings without reducing programming service rates;[66] in other words, that the reciprocal relationship between equipment and service rates extends to subsequently submitted rate filings. On the other hand, the Commission also has held that "[t]his reciprocal relationship does not extend beyond the initial unbundling."[67]

In any event, the Commission has recognized that retroactive revision of the unbundling process presents practical problems, creates undue administrative burdens, and would interfere with the finality of its rate regulations process.[68] Given the passage of almost nine years since

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66 *See, e.g., TCI Cublevision of St. Louis, Inc.*, 12 FCC Rcd 15287 at para. 20 (Cab. Serv. Bur. 1997).

> When TCI-SL filed Form **1205,** in 1994 and 1995, TCI-SL did not include these insurance costs in its calculation of equipment basket costs. These costs, therefore, were recovered in program service rates. In assigning these costs now to its equipment basket, TCI-SL should have deducted them from its program service rates, otherwise TCI-SL would be recovering these costs twice. TCI-SL had these costs at the time it unbundled its rates, but only now identifies these costs as ones that should be included in the equipment basket, thereby revealing that TCI-SL's original unbundling was inadequate. TCI-SL did not, as it should have done, propose equitable adjustments to programming service rates on a going forward basis.

See also TCI Cablevision of Nevada, Inc., 11 FCC Rcd 14378 at paras. 14-16 (Cab. Serv. Bur. 1996).

67 *Comcast Cublevision of Detroit, Inc.*, 15 FCC Rcd 24022 at para. 30; *see also TCI Cublevision of Ohio, Inc.*, 13 FCC Rcd 733 at para. 11 and n.21 (Cab. Serv. Bur. 1998); *Telerama, Inc.*, 11 FCC Rcd 17369 (Cab. Serv. Bur. 1996).

68 In *Western Reserve Cublevision,* for example, the Commission found that:

> Because of the reciprocal relationship between equipment costs and regulated revenues for programming tiers, reopening the unbundling of the monthly equipment cost per subscriber computed on FCC Form 1205 from the operators' total regulated revenue in Form 1200 would reopen the BST rates and refunds determined in the *Adelphia* ***Resolution.*** If the equipment rates were reduced as a result of a revised unbundling process, the revenues for computing the tier rates would be adjusted upward and the initial regulated rate would be increased. . . . For this reason and because the LFAs' rate orders did not address the operators' computations of additional outlet charges . . . we agree with Adelphia that review of [the **LFA** rate **orders]** with respect to additional outlet

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cable operators were required to unbundle service and equipment rates, during which time LFAs have had ample opportunities to question whether particular costs were included or excluded from an operator's initial unbundling calculation, Cox believes the Commission should resolve the apparent inconsistencies in these cases and find that strict historical linkage in the "unbundling" of equipment costs no longer is required.[69] Cable operators should not be subjected to the manifest unfairness of having an LFA accept the operator's Form 1205 costs for years only to object many years later and either (i) demand that the operator demonstrate such costs were properly unbundled in 1993 or 1994, or (ii) reject costs that the operator included in its initial FCC Form 1205 used to unbundle service and equipment rates. Indeed, in analogous contexts, the Commission's rules specifically limit the LFA's oversight authority to a one-year period." This approach would be consistent with the Commission's elimination of "all rates in play" in the *Thirteenth Reconsideration Order* based, among other things, upon the LFA's determination to accept the operator's previous rates as reasonable.[71] As the Commission acknowledged in *TCI Cablevision of St. Louis,*[72] the rate regulation process should lead to equitable results.

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> costs unbundled from the BST rates has been rendered moot by the *Adelphia Resolution,* 12 FCC Rcd **at 6364** . . . .

Western Reserve Cablevision. Inc., 14 FCC Rcd 13391 (Cab. Serv. Bur. 1999) (citation omitted) (citing *Century Communications Corp.*, 12 FCC Rcd 18009, 18020 (1997)).

69 In other words, LFAs should be prohibited from removing *bona fide* pre-existing costs from an operator's FCC Form 1205 that the LFA accepted in prior filings without a commensurate offsetting increase in regulated service rates. The LFA also should be required to demonstrate that any category of "pre-existing" costs it claims should be excluded from the operator's Form 1205 were in fact not included the initial Form 1205 used to unbundle rates.

70 *See* 47 C.F.R. § 76.933(g)(2); 47 C.F.R. § 76.942(b).

71 Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation, *Thirteenth Order on Reconsideration,* 11 FCC Rcd 388,451-52, para. 164 (1995) *("Thirteenth Reconsideration Order").*

72 *TCI Cablevision of St. Louis, Inc.*, 12 FCC Rcd 15287 at para. 20.

VI. Recovery of Lost Equipment and Installation Revenues due to Subsequently Reversed Rate Orders.

A. The Commission Should Permit Recovery of all Lost Revenues as a Temporary Addition to the Regulated BST Rate.

Cox supports the Commission's proposal to "allow cable operators to recover the amount of revenues lost or excess refunds paid due to local rate orders subsequently reversed by the Commission."[73] As the Commission observed, "when franchising authorities unreasonably limit rates, they deny operators the cost recovery determined to be permissible under the Commission's rules and rate forms and contemplated by section 623(b)(3) [of the Communications Act]."[74] The Commission accordingly should take the opportunity to rectify this inequity.

Cox notes, however, that the Commission's proposal to allow recovery "through an entry on Form 1205, perhaps as an 'other' expense on Form 1205, Schedule B"[75] will not achieve the Commission's intended result because the mechanics of FCC Form 1205 will reduce the amount reflected on Schedule B by the Customer Equipment and Installation Percentage found on Step A, Line 4 of the Worksheet for Calculating Permitted Equipment and Installation Charges. This would prevent full recovery of the operator's lost revenues.

The Commission therefore should consider allowing operators to recover such costs by temporarily adding to the BST rate an incremental charge sufficient to recover the revenues lost or refunds paid pursuant to the erroneous rate order, in the same manner as network upgrade costs are now recovered under Section 76.922(j)(5) of the rules.[76] Cox believes the simplest and easiest to administer option would be to allow operators to calculate the incremental MPR adjustment in the same manner as CPST rate refunds using IRS interest information. This

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73 *NPRM* at para. 50.

74 *Id.*

75 *Id.*

76 47 C.F.R. § 76.922(j)(5).

methodology is well understood by both operators and LFAs and is familiar to the Commission's staff. In addition, implementation of this methodology would require no amendments to the Commission's rate forms and, in Cox's view, therefore imposes the least possible administrative burden on all parties.

VII. Procedures for Commission Review of Local Rate Decisions.

A. The Commission Should Provide Specific Directions to LFAs in Remanding Local Orders Reversed on Appeal.

Cox agrees that the Commission should reconsider the level of deference it affords to local rate orders. In contrast to the suggestion in paragraph 54 of the *NPRM*, however, the Commission's standard of review for LFA rate orders should be changed so that incorrect and unreasonable local orders are not, as they are now, simply remanded without specific instructions to the LFA. Rather, administrative efficiency would be best served by including in such remand orders express guidance for the LFA on how to resolve the outstanding issues.

The case of *Maryland Cable Partners. L.P. v. City of Bowie, Maryland* provides an apt, but unfortunately not uncommon, example.[77] *Maryland Cable* involved the straightfonvard application of the Commission's rule that statutory tax rates be used in completing FCC Form 1205.[78] The City in that case acknowledged, but simply refused to follow, the Commission's rules or the Commission's remand decision, and ordered the operator to provide substantial

[77] *Maryland Cable Partners, L.P. v. City of Bowie, Maryland,* 12 FCC Rcd 11951 (Cab. Serv. Bur. 1996); 13 FCC Rcd 5218 (Cab. Serv. Bur. 1998), *application for review denied*, 15 FCC Rcd 10964 (2000); *15* FCC Rcd 12662 (Cab. Serv. Bur. 2000).

[78] *See* Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation and Adoption of a Uniform Accounting System for Provision of Regulated Cable Service, *Second Report and Order, First Order on Reconsideration, and Further Notice of Proposed Rulemaking ("Final Cost Order"),* 11 FCC Rcd 2220, 2255 (1996); Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation and Adoption of a Uniform Accounting System for Provision of Regulated Cable Service, *Report and Order and Further Notice of Proposed Rulemaking,* 9 FCC Rcd 4527, 4612, 4634-35 (1994) *("First Cost Order");* FCC Form 1205, pp. 8-10.

refunds. According to the City, "[a]lthough the Federal Communications Commission Cable Services Bureau has determined to use a uniform rate for whatever reason . . . the [City] believes that it is appropriate to use the actual taxes paid by the operator."[79] Due to the City's "belief' in that case, the cable operator was forced to take three separate appeals to the Commission, defend against the City's application for review, and spend four years litigating the matter before the Commission. **As** the Commission noted in denying the City's application for review, "[t]he City interpreted the Bureau's remand to hold that the City was simply required to explain its reason for a 0% rate, not that the City could not use a 0% rate."" The Commission, however, could have avoided the undue administrative and financial burden that the City imposed on both the operator and the Commission by issuing specific directions to the LFA rather than simply remanding the matter "to the local franchising authority for further proceedings consistent with this order.""

Cox believes the Commission should act now to relieve cable operators of the current quagmire, exemplified by the *Maryland Cable* case, in which local rate orders must be appealed to the Commission several times before the LFA complies with the Commission's rules. Rather than remanding appeals to LAFs with general instructions to act consistently with the Commission's order, the Commission should direct LFAs specifically and in detail about the actions they will be required to take and should impose a time period in which those actions must be implemented, Assuming this leadership role will promote regulatory certainty and administrative efficiency by ensuring that LFAs take up the Commission's remand orders in a timely manner and, that they act consistently with the Commission's findings.

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79 *Maryland Cable Partners,* 13 FCC Rcd 5218 at para. 14 (alteration in original) (quoting LFA rate order).

80 *Id.* at para. 6.

81 *Maryland Cable Partners,* 12 FCC Rcd 11951 at para. 9.

VIII. Charges for Changes in Service Tiers.

A. The Commission Should Clarify that Charges for Service Tier Changes are Unregulated.

The Commission should clarify that charges for programming service tier changes may not be regulated by LFAs because (i) the 1992 Cable Act authorized only the regulation of charges for subscriber initiated changes in services and equipment that were themselves subject to regulation under the statute and because *(ii)* only the BST and the equipment used to receive the BST are subject to regulation under the Communications Act.[82] Rather than simply eliminate Section 76.980(b), (d)-(f) of the Commission's rules, as proposed in paragraph 9 of the *NPRM,* the Commission's order should clarify that Section 76.980 is applicable only to regulated equipment and services, and that LFAs therefore are prohibited from regulating charges for customer initiated changes in services and are limited to regulating charges for changes in regulated equipment.

Section 623 (b)(5)(C) of the Communications Act charged the Commission with implementing and enforcing, among other things:

> standards and procedures to prevent unreasonable charges for changes in the subscriber's selection of services or equipment *subject to regulation under this section,* which standards shall require that charges for changing the service tier selected shall be based on the cost of such change and shall not exceed nominal amounts when the system's configuration permits changes in service tier selection to be effected solely by coded entry on a computer terminal or by other similarly simple method.[83]

In accordance with the statute, and because both the BST and CPSTs were subject to regulation, the Commission adopted regulations in 1993 that specifically permitted cable operators to recover the costs incurred by subscriber requested upgrades and downgrades in service.[84]

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82 *See* 47 U.S.C. § 543(c)(4).

83 47 U.S.C. § 543(b)(5)(C) (emphasis added).

84 The Commission held that operators may impose a nominal charge, *i.e.*, any charge under

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Given the congressionally prescribed elimination of CPST regulation in March 1999,[85] however, the statutory basis for regulating charges for any customer initiated changes in programming services has been removed. Therefore, although LFAs may continue to regulate charges for changes in regulated equipment — *i.e.*, equipment "used to receive" the BST pursuant to the Commission's rules — the Commission should revise and clarify its rules to reflect statutory changes that have occurred since adoption of Section 76.980. Cox believes that to implement the statute faithfully, the Commission's order must state that LFAs are prohibited from regulating charges for customer initiated changes in services and are limited to regulating charges for changes in regulated equipment. This approach would be consistent with the Commission's determination in the *Rate Order* to preempt state and local laws and regulations regarding charges for tier changes "to the extent that they conflict with Commission rules implementing Section 623(b)(5)(C)."[86]

IX. Other Matters.

A. The Commission Should Delete the Reference to Cable Programming Service in the Uniform Rate Rule.

Although not mentioned in the *NPRM*, the Cornmission has solicited comment regarding

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$2.00, for subscriber service changes "effected solely by coded entry on a computer terminal or by other similarly simple method." *Rate Order,* 8 FCC Rcd at 5833, para. 322. The Commission also authorized increased charges for changing service tiers more than twice in one year; *e.g.*, "if a customer changes service tiers for a third time in one year, the charge might be $5.00, and the charge for the fourth change might be $10.00." *Zd.* at 5834, n.796. For changes in service that involved more than simply a coded entry on a computer, the Commission held that its actual cost standard generally applicable to equipment and installation charges would determine the permitted charge. "The actual cost charge would be either the HSC times the [actual] amount of time it takes to effect the change or HSC times the average time such changes take." *Id.* at 5834, para. *323.* The Commission also held that "the same standards should apply to upgrades and downgrades in service tiers because the same costs are involved in both types of changes." *Id.* at 5833, para. 321 (footnote omitted).

85 *See* 47 U.S.C. § 543(c)(4); 1996 Telecommunications Act, § 301(b)(4), 110 Stat. 56, 115.

86 *Rare Order, 8* FCC Rcd at 5833, n. 793.

other possible changes to BST rate regulation “that might logically follow from the changed scope of regulation and intervening developments subsequent to the adoption of the initial rules.”” In this regard, and given the deregulation of CPST pursuant to the 1996 Telecommunications Act, the Commission should eliminate the reference to cable programming service in Section 76.984 of the rules concerning uniform rates.[88] Omission of this issue from the otherwise comprehensive *NPRM* appears to be nothing more than an inadvertent oversight, and elimination of the reference is justified fully by developments that have occurred since the Commission adopted its initial rules in 1993, including the Congress’s explicitly expressed intent in the 1996 Telecommunications Act that unregulated services are to be removed from the ambit of the uniform rate structure rule.

In the 1992 Cable Act, Congress required that cable operators “shall have a rate structure, for the provision of cable service, that is uniform throughout the geographic area in which cable service is provided over its cable system.”[89] The Commission determined, and the courts agreed:’ that the uniform rate structure rule properly focused “on regulated systems in regulated markets.”” In the 1996 Telecommunications Act, Congress amended the uniform rate provision by, among other things, exempting from the scope of the provision “any video programming offered on a per channel or per program basis.”[92] Possibly because the CPST remained subject to regulation in 1996, the statutory language omitted a specific exemption for the CPST, which Congress determined would be deregulated in March 1999.[93] Nevertheless, Congress stated

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87 *NPRM* at para. 3.

88 47 C.F.R. § 76.984(a).

89 1992 Cable Act, § 3(a), 106 Stat. 1464, codified at 47 U.S.C. § 543(d).

90 ***Time Warner Entertainment*** Co. *v. FCC*, 56 F.3d 151,190-91 (D.C. Cir 1995).

91 ***Rate Order,*** 8 FCC Rcd at 5896.

92 1996 Telecommunications Act, § 301(b)(2), 110 Stat. 115, codified at 47 U.S.C. § 543(d)(2).

93 47 U.S.C. § 543(c)(4).

explicitly that the purpose of its amendment was to clarify "that a cable operator must comply with the uniform rate structure requirement in section 623(d) of the 1992 Cable Act *only with respect to regulated services*."[94]

Given congressional intent to limit the uniform rate provision to regulated services and its concomitant determination to deregulate CPSTs, Cox believes the Commission should conform its rules accordingly and eliminate the reference to cable programming service in Section 76.984 of the rules.

B. The Commission Should Include Pole Attachment Fees as External costs.

The Commission should include as an "external cost" under Section 76.922(f) of its rules the pole attachment fees that cable operators are forced to incur for the provision of rate-regulated cable services. At the very least, the Commission should include in this rule pole attachment fees remitted to municipal and cooperative electric utilities, which are exempt from the protections afforded to cable operators and telecommunications providers under the Pole Attachment Act.[95]

In the *Second Reconsideration Order*, the Commission declined to treat pole attachment fees as external costs under the rate regulations because

> [u]nlike increases in franchise fees or taxes, pole attachment fees are not imposed by the government nor are they, like programming expenses, an area with respect to which the legislative history of the 1992 Cable Act expresses explicit concern. In addition, some pole attachment fees arc regulated under the 1978 Pole Attachment Act . . . which should provide operators some recourse against unreasonable pole attachment fee increases.[96]

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94 H.R. CONF. REP. NO. 104-458, at 168, *reprinted in* 1996 U.S.C.C.A.N. 10, at 181 (emphasis added).

95 47 U.S.C. § 224

96 *Second Reconsideration Order*, 9 FCC Rcd at 4206, para. 182.

Although the Commission stated it would consider waivers "in instances of significant hardship resulting from unusually large pole attachment fee increases imposed by utilities or other pole providers not subject to regulation under the Pole Attachment Act[,]"[97] to date no such waiver has been granted.[98]

As the Commission is aware, even among entities subject to the Pole Attachment Act, the magnitude of unreasonable pole attachment fee increases has increased exponentially since adoption of the *1996* amendments to the Pole Attachment Act, which, among other things, mandated a new pole attachment rate formula for telecommunications attachments.[99] In Cox's experience, such rate increases have been even more unreasonable where the pole owner is unrestrained by the Pole Attachment Act. Cox therefore urges the Commission to relieve cable operators of the undue administrative burden of seeking case-by-case waivers to obtain relief from unreasonable increases in costs that operators clearly have little ability to moderate. As the Commission has held with regard to other external costs, "[t]hese costs are largely beyond the control of the cable operator, and should be passed on to subscribers without a cost-of-service showing."[100]

C. The Commission Should Clarify That it Intends to Retain the Bill Itemization Rule.

Finally, paragraph *9* of the *NPRM* indicates that the Commission proposes to delete, among other things, Section *"76.985* (FCC Form *329* and Instructions)." Cox agrees that given

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[97] *Id.* at n.243.

[98] *See The Helicon Group, L.P.*, *11* FCC Rcd *2376* (Cab. Serv. Bur. *1996); TCI of Seattle, Inc.*, *11* FCC Rcd *2378* (Cab. Serv. Bur. *1996); TCI Cablevision of Washington, 11* FCC Rcd *2380* (Cab. Serv. Bur. *1996); United Cable Television of East San Fernando Valley, Ltd.*, 11 FCC Rcd *2382* (Cab. Serv. Bur. *1996).*

[99] *See, e.g., Teleport Communications Atlanta. Inc. v. Georgia Power Company, 16* FCC Rcd *20238* (Cab. Serv. Bur. 2001), *petition for review pending sub nom. Georgia Power v. Federal Communications Commission,* No. *02-10222-B* (11th Cir. filed January 11, 2002), *application for review denied,* FCC *02-270,* __ FCC Rcd __ (released Oct. *8,2002).*

[100] *Rate Order, 8* FCC Rcd at *5790,* para. *254.*

the deregulation of CPSTs, the FCC Form 329 “Cable Programming Service Rate Complaint Form” and its instructions, which appear in the Commission’s rules immediately following Section 76.985 “Subscriber bill itemization,”[101] are no longer relevant and should be deleted. Nevertheless, because the substance of Section 76.985 governs bill itemization rather than CPST complaints, Cox suggests that to avoid any possible confusion, the Commission should clarify that it intends to retain the substance of its rule and to delete only the FCC Form 329 and its associated instructions.

[101] 47 C.F.R. § 76.985.

CONCLUSION

For the reasons explained above, Cox urges the Commission to adopt the recommendations set forth herein.

Respectfully Submitted,

COX COMMUNICATIONS, INC.

By [signature]

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November 4,2002

HISTORICAL APPENDIX

Development of the Commission's Rules for the Addition, Deletion, and Movement of Regulated Programming Services

In the *Third Notice of Proposed Rulemaking*[102] in its cable rate regulation proceeding, the Commission considered three proposals for adjusting rates to account for the addition and deletion of channels under the benchmark rate-setting methodology. Under the first proposed methodology, the rate would have consisted of the sum of (i) the current permitted charge for the existing channels on the tier; and (ii) a charge for the new channels consisting of the benchmark rate for the total number of channels on the tier multiplied by the number of new channels. The Commission concluded it should reject this proposal because, among other things, it would have permitted pricing above the economies of scale reflected in the benchmark curve and because the Commission was uncertain that the proposal "would work for determining the new permitted rate associated with channel deletions."[103]

Under the second proposed methodology, "the new permitted rate for a regulated tier with added or deleted channels would [have] be[en] the benchmark per channel rate based on the new number of channels on the system multiplied by the number of channels on the tier." The Commission concluded it should not adopt this proposal "because it would create substantial disincentives for cable operators with rates above the benchmark to add channels" and "could create undue incentives for systems with rates below benchmark rates to add channels, permitting substantially increased rates."[104]

Under the third proposed methodology, which the Commission subsequently adopted,

> the new permitted per channel rate [would] be the existing

[102] Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation, *First Order on Reconsideration, Second Report and Order, and Third Notice of Proposed Rulemaking,* 9 FCC Rcd 1164, 1239-46 at paras. 132-144 (1993).

[103] *Id.* at 1243, para. 137.

[104] *Id.* at para. 138.

> permitted per channel rate adjusted for programming expense . . . and adjusted to reflect the same proportionate per channel rate increase or decrease observed in the benchmark curve. Under this option, the new permitted per channel rate would not directly reflect the benchmark rate but only the benchmark's proportionate increase or decrease in per channel rates."[105]

The Commission concluded that it should adopt this approach because, among other things, it "would benefit subscribers by requiring that rates reflect the same efficiencies and economies of scale observed in benchmark rates."[106] The Commission specifically determined that its methodology would apply to both the addition and deletion of channels.[107]

In the *Second Reconsideration Order,*[108] the Commission adopted the third proposal outlined in its *Third Notice of Proposed Rulemaking* for both the addition and deletion of channels.[109] The Commission stated that the third proposal — which became known the **"Mark-**Up" methodology because it required a 7.5% mark-up or mark-down on certain external costs while limiting the non-external portion of any rate adjustment to only the incremental change in the benchmark rate associated with the added or deleted services"' — was "fully compatible with [the Commission's] revised benchmark formula and approach for setting regulated rates,""' and noted that the first two alternative proposals were "not compatible with [the] revised benchmark approach and cannot be adopted.""' The Commission explained that under the Mark-Up method:

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[105] *Id.* at para. 139.

[106] *Id.* at 1244, para. 140.

[107] *Id.* at 1246, n.252.

[108] *Second Reconsideration Order,* 9 FCC Rcd 4119.

[109] *Id.* at 4241-4244, paras. 244-248.

[110] *Id.* at 4242-43, n.345. The Commission chose the 7.5% mark-up rate as "a cautious choice for an annual permitted mark-up on programming expense" to balance its belief that the return on programming expense should be less than the 11.25% return adopted in its cost-of-service proceeding with its concern of assuring "the continued growth of programming services" by avoiding establishing a return "at a minimal level." *Id.*

[111] *Id.* at 4241, para. 244 (footnote omitted).

[112] *Id.* at n.341.

> operators will first remove all external costs from the tier charge and then adjust the residual component of the tier charge by a specified amount per channel when the total number of regulated channels increases. Should the total number of regulated channels decrease, the residual component of [the] tier charge will be reduced by a specified amount. The per-channel adjustment factors used to calculate permitted tier charges are derived from our benchmark equation and appear as a Table. . . .[113]
>
> * * * *
>
> When a cable system changes the number of regulated channels offered, it must average the initial and final number of channels and find the adjustment factor in the table corresponding to that average. For any service tier, *the total permitted adjustment is the product of the per channel adjustment factor and the change in the number of regulated channels on that tier. The adjustment is positive if the number of regulated channels has increased and negative if the total number of regulated channels has decreased.* If a cable operator is merely restructuring tiers and there is no change in the total number of regulated channels, then the operator would find its total number of regulated channels in the table, note the corresponding per channel adjustment factor, and calculate adjustments in network costs per tier as explained earlier in this paragraph. After the residual component of the tier charge is adjusted in this fashion, all external costs, including programming expenses, will be combined with the adjusted residual to determine the final tier charge. **As** stated, any increased level of programming expense will be entitled to a 7.5 percent mark-up.[114]

The Commission codified its procedure for adjusting regulated rates to reflect the addition and deletion of channels in Section 76.922(e) of its rules.[115] For the overwhelming majority of cable television systems, the Commission's Mark-Up methodology resulted in a non-external per-channel rate adjustment in the range of $0.01 to $0.03 whenever a regulated programming service was either added to or deleted from a regulated tier.[116]

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[113] *Id.* at 4243, para. 247. The Commission's per-channel adjustment factor table originally appeared in Section 76.922(e)(1) of the rules, 47 C.F.R. § 76.922(e)(1) (1994), and now appears in Section 76.922(g)(2) (2001).

[114] *Id.* at 4244, para. 248 (emphasis added).

[115] 47 C.F.R. § 76.922(e) (1994). The Commission's pre-existing rule is attached hereto as Exhibit 1. FCC Form 1210 incorporated the methodology in Module G and FCC Form 1240 incorporated the methodology in Worksheet 3.

[116] The table in Section 76.922(e)(1) (1994) of the Commission's rules specified a $0.03 per channel non-external rate adjustment for cable systems with between 30 and 35.5 average regulated channels, a $0.02 adjustment for systems with between 36 and 46 regulated channels,

(continued. . .)

With the benefit of experience, the Commission soon understood that the modest per-channel rate adjustment permitted under the Mark-Up methodology provided an economic disincentive for cable operators to expand their systems and their services — and consequently was inconsistent with the 1992 Cable Act's policy of "ensur[ing] that cable operators continue to expand [them], where economically justified."”’ In the *Sixth Reconsideration Order*,[118] therefore, the Commission determined, among other things, to experiment with eliminating that disincentive and, as an interim measure, temporarily permitted cable operators to add as many as seven programming services to their CPSTs at $0.20 per channel plus $0.05 per channel license fees."’ This new methodology became known as the "Caps" method.

However, because the *Sixth Reconsideration* Order authorized non-external price adjustments for the addition of CPST channels in excess of the commensurate adjustment under the benchmark methodology established pursuant to the 1992 Cable Act, and because, among other things, the *Sixth Reconsideration Order* departed from the Commission's tier neutral benchmark rate-setting methodology for the addition and deletion of regulated services, the Commission expressly limited the term of its new interim rules to the period ending December 31, 1997. The Commission justified its interim departure from tier-neutrality to (i) preserve rate stability on the BST, (ii) maximize subscriber choice by providing enhanced incentives to add services to CPSTs, and (iii) avoid increasing "the complexity of the regulatory task faced by local

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(. . . continued)
and a $0.01 adjustment for systems with between 46.5 and 99.5 regulated channels. 47 C.F.R. § 76.922(e)(1) (1994). Following adoption of the Commission's annual rate adjustment rules in the *Thirteenth Reconsideration Order*, the rule and the table were relocated to Section 76.922(g)(2). ***See*** *Thirteenth Reconsideration Order,* 11 FCC Rcd at 456-92, App. B; 47 C.F.R. § 76.922(g)(2) (2001).

117 1992 Cable Act, § 2(b)(2), 106 Stat. 1463.

118 10 FCC Rcd 1226.

119 *Sixth Reconsideration Order,* 10 FCC Rcd at 1244-1257, 1260, paras. 54-86, 98. *See* Exhibit 2. The Commission also temporarily adopted, among other things, new associated interim methodologies for adjusting regulated rates to reflect the addition, deletion, movement, and substitution of regulated programming services on and between regulated BSTs and CPSTs.

regulatory authorities.”[120] Absent additional Commission action to extend the new rules, which the Commission later declined to undertake, the Commission specified that its pre-existing rules for the addition and deletion of regulated services would be reinstated automatically and the new rules would be deleted pursuant to the terms of the *Sixth Reconsideration Order*.[121]

> The new rule for adjusting rates when channels are added, deleted or substituted on CPSTs will be in place through December 31, 1997, and will be reviewed prior to the end of that period to determine if there is any reason to continue to provide incentives to increase the number of channels on any CPST. The new rule will expire on that date and will be replaced by our existing rule unless it is reinstated by the Commission.[122]

Although paragraph 98 of the *Six Reconsideration Order* refers to the CPST, the practical consequences of the new rule also significantly altered the calculation of BST rates despite the Commission’s specific determination that “[r]ates for the BST will continue to be governed exclusively by our current rules.”[123] In contrast to the Commission’s stated intention, the codification of the new rules in fact departed from the then current BST rules by limiting application of the Mark-Up methodology to the *addition* of BST channels rather than the addition and deletion of such channels, as required under the Commission’s *Second Order on Reconsideration. Compare* 47 C.F.R. § 76.922(e) (1994)[124] with 47 C.F.R. § 76.922(e)(2) (1995).[125]

This inconsistency apparently resulted from the Commission’s effort to devise a single methodology to account both for the movement of programming services between regulated tiers,

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120 *Sixth Reconsideration Order,* 10 FCC Rcd at 1250-51 (footnote omitted).

121 *Id.* at 1248-49, para. 65, and 1260, para. 98.

122 *Id.* at 1260, para. 98.

123 *Id.* at 1249, para. 65.

124 47 C.F.R. § 76.922(e) (1994): *Changes in the number ojchannels on regulated tiers,* attached hereto as Exhibit 1.

125 47 C.F.R. § 76.922(e)(2) (1995): *Adjusting Rates for increases in the number of channels offered between May 15, 1994 and December 31, 1997, on a basic service tier and at the election of the operator on a cahleprogramming service tier,* attached hereto as Exhibit 2.

where the total number of programming services carried on regulated tiers remained unchanged, and for increases and decreases in the total number of programming services on regulated tiers. A methodology to account for the movement of channels between regulated BSTs and CPSTs would be designed to ensure that the operator's non-external costs and Caps method adjustments were accurately distributed among regulated tiers when programming services were moved between them. On the other hand, under this methodology, accounting for increases and decreases in the total number of regulated channels also would necessarily be designed to reflect (i) the benchmark curve for non-Caps channels and (ii) the actual Caps method adjustment for eligible channels added during the interim period that ended on December 31, 1997. This attempt to craft a reasonable and administratively workable means to account for both channel movements as well as additions and deletions notwithstanding, however, the Commission's interim methodology for calculating the non-external, or "residual," portion of the regulated per-channel rate neglected to distinguish between channel movements and channel additions and deletions.

Consequently, the Commission's new, temporary methodology for calculating a channel's residual cost for purposes of moving channels between regulated tiers and for deleting channels specified that:

> Operators also will be required to reduce the price of that tier by the "residual" associated with that channel. For channels that were on a BST or CPST on or before May 14, 1994 or channels added after that date pursuant to the current rules, the per channel residual is the charge for the tier, minus the external costs for the tier, and any per channel adjustments made after that date, divided by the number of channels on the tier. For channels added to a CPST on or after May 15, 1994 pursuant to our new channel addition rules, the residuals shall be the actual per channel adjustment taken for that channel when it was added to the tier plus any inflation adjustment since that time. The residual and programming cost shall be calculated as of the date the channel is dropped.[126]

[126] ***Sixth** Order on Reconsideration,* 10 FCC Rcd at 1256, para. 84.

The Commission's temporary method for calculating channel residuals was strikingly similar to the first proposed methodology set forth the *Third Notice of Proposed Rulemaking*, which the Commission rejected in the *Second Order on Reconsideration*.[127] Nevertheless, for the period ending December 31, 1997, the Commission's new temporary rule limited cable operators to the Mark-Up method for adjusting rates to reflect an additional BST channel, but required use of the new residual calculation to reflect a BST channel deletion, despite the Commission's stated determination that BST rates would continue to be governed by the Mark-Up method. In practice, the Commission's temporary rule permitted a non-external rate adjustment of, *e.g.*, between $0.01 and $0.03 for the addition of a new BST programming service, but required between approximately a $0.30 to $0.50 adjustment if an existing BST programming service were deleted or moved to the then regulated CPST.[128]

Given the Commission's stated determination to continue governing BST rates under the Mark-Up methodology,[129] and to preserve rate stability on the BST,[130] these further temporary rule modifications were inextricably related to implementation of the Commission's interim Caps channel addition methodology. Thus, in addition to temporarily adopting the "Caps" method for the addition of CPST channels, the Commission also intended to *temporarily* limit application of the Mark-Up methodology to the addition of BST channels, and *temporarily* revised the method for calculating non-external, or "residual," costs for purposes of moving, substituting, and deleting channels from regulated tiers. As noted, the Commission's interim methodology for calculating the non-external, or "residual," portion of the regulated rate ensured only that the operator's non-external costs and Caps method adjustments were accurately distributed between

[127] *See supra* p.10, and *Third Notice of Proposed Rulemaking,* 9 FCC Rcd at 1243, para. 137.

[128] The FCC's revised Form 1210 incorporated the Mark-Up method in Module G, the revised residual calculation in Module H, and the Caps method in Module F. FCC Form 1240 incorporates the Mark-up Method in Worksheet 3, the revised residual calculation in Worksheet 4, and the Caps method in Worksheet 2.

[129] *Sixth Reconsideration Order,* 10 FCC Rcd at 1249, para. 65.

[130] *Id.* at 1250-51.

regulated tiers when programming services were moved between them, but failed to accurately reflect the benchmark curve with regard to the deletion of non-Caps channels.

CERTIFICATE OF SERVICE

I, Sandra Dallas, a secretary at the law firm of Dow, Lohnes & Albertson, PLLC, certify that on this fourth day of November 2002, I caused the foregoing Comments of Cox Communications, Inc. to be served by first-class mail, except where hand delivery is indicated, on the following:

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Sandra Dallas

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By Hand* ***Delivery*

Exhibit 1

increase its rates subsequently to reflect the changes.

(ii) A system must adjust its rates in the next calendar year quarter for any decrease in programming costs that results from the deletion of a channel or channels from a regulated tier.

(iii) Any rate increaae made to reflect an increase in external costs must also fully account for all other changes in external costs. inflation and the number of channels on regulated tiers that occurred during the same period. Rate adjustments made to reflect changes in external costs shall be baaed on any changes in those external costa that occurred from the end of the last quarter for which an adjustment was previously made through the end of the quarter that has most recently closed preceding the filing of the FCC Form 1210 (or FCC Form 1211, where applicable). A system may adjust its rates after the close of a quarter to reflect changes in external costs that occurred during that quarter as soon as it has sufficient information to calculate the rate change.

(iv) External costs shall consist of costs in the following categories:

(A) State and local taxes applicable to the provision of cable television service:

(B) Franchise fees;

(C) Costs of complying with franchise requirements, including costs of providing public, educational, and governmental access channels as required by the franchising authority;

(D) Retransmission consent fees and copyright fees incurred for the carriage of broadcast signals; and

(E) Other programming costs.

(v) The permitted charge for a regulated tier shall be adjusted on amount of programming costs. copyright fees and retransmissicn consent fees only for the program channels or broadcast signals offered on that tier.

(vi) The permitted charge shall not be adjusted for costs of retransmission consent fees or changes in those fees incurred prior to October 6.1994.

(vii) The starting date for adjustments on amount of external costs for a tier of regulated programming service shall be the earlier of the initial date of regulation for any basic or cable service tier or February 28, 1994.

(viii) Changes in franchise fees shall not result in an adjustment to permitted charges, but rather shall be calculated separately as part of the maximum monthly charge per subscriber for a tier of regulated programming service.

(ix) Adjustments to permitted charges to reflect changes in the costs of programming purchased from affiliated programmers. as defined in 816.901, shall be permitted a8 long as the price charged to the affiliated system reflects either prevailing company prices offered in the marketplace to third parties (where the affiliated program supplier has established such prices) or the fair market value of the programming.

(x) Adjustments to permitted charges on account of increases in costs of programming shall be fnrther adjusted to reflect any revenues received by the operator from the programmer.

(xi) In calculating programming expense. operators may add a mark-up of 1.6% for new programming added after May 15. 1994 and shall reduce rates by decreases in programming expense plus an additional 7.5% for decreases occurring after May 15, 1994.

(e) *Changes in the number of channels on regulated tiers.* (1) A system may adjust the residual component of its permitted rate for a tier to reflect changes in the number of channels offered on the tier on a quarterly basis. Cable systems shall use FCC Form 1210 (or FCC Form 1211. where applicable) to justify rate changes made on account on changes in the number of channels on a regulated tier. Such rate adjustments shall be baaed on any changes in the number of regulated channels that occurred from the end of the last quarter for which an adjustment waa previously made through the end of the quarter that has most recently closed preceding the filing of the FCC Form 1210 (or FCC Form 1211. where applicable). However, when it deletes channels in a calendar quarter, a system must adjust the residual component of the tier charge in the next calendar quarter to reflect that deletion. The following table shall be used to adjust permitted rates for a tier for changes in the number of channels offered on the tier. The entries in the table provide the cents per channel per subscriber per month by which cable operators will adjust the residual component using FCC Form 1210 (or FCC Form 1211, where applicable).

Average number of regulated channels	Per-channel adjustment factor
7	$0.52
1.5	0.95
8	0.40
8.5	0.38
9	0.33
9.5	0.29
10	0.27
10.5	0.24
11	0.22
11.5	0.20
12	0.19
12.5	0.17
13	0.16
13.5	0.15
14	0.14
14.5	0.13
15–15.5	0.12
16	0.11
16.5–17	0.10
17.5–18	0.09
18.5–19	0.08
19.5–21.5	0.07
22–23.5	0.06
24–26	0.05
26.5–29.5	0.04
30–35.5	0.03
36–46	Om
46.5 and above	0.01

forms and associkted instructions established by the Commission.

(g) *Cost of service charge.* (1) For purpose of this section. a monthly cost-of-service charge for a basic service tier or a cable programming service tier is an amount equal to the annual revenue requirement for that their divided by a number that is equal to 12 times the average number of subscribers to that tier during the test year, except that a monthly charge for a system or tier in service less than one year shall be equal to the projected annual revenue requirement for the first 12 months of operation or service divided by a number that is equal to 12 times the projected average number of subscribers during the first 12 months of operation or service. The calculation of the average number of subscribers shall include all subscribers, regardless of whether they receive service at full rates or at discounts.

(2) A test year for an initial regulated charge is the cable operator's fiscal year preceding the initial date of regulation. A test year for a change in the basic service charge that is after the initial date of regulation is the cable operator's fiscal year preceding the mailing or other delivery of Written notice pursuant to $76.932. A test year for a change in a cable programming service charge after the initial rate of regulation is the cable operator's fiscal year preceding the filing of a complaint regarding the increase.

(3) The annual revenue requirement for a tier is the sum of the return component and the expense component for that tier.

(4) The return component for a tier is the average allowable test Year ratebase allocable to the tier adjusted for known and measurable changes occurring between the end of the test year and the effective date of the rate multiplied by the rate of return Specified by the Commission or franchising authority.

(5) The expense component for a tier is the sum of allowable test year expenses allocable to the tier adjusted for known and measurable changes occurring between the end of the test year and the effective date of the rate.

(6) The ratebase may include the following:

Exhibit 2

changes in external costs shall be based on any changes in those external costs that occurred from the end of the last quarter for which an adjustment was previously made through the end of the quarter that has most recently closed preceding the filing of the FCC Form 1210 (or FCC Form 1211, where applicable). A system may adjust its rates after the close of a quarter to reflect changes in external costs that occurred during that quarter as soon as it has sufficient information to calculate the rate change.

(iv) External costs shall consist of costs in the following categories:

(A) State and local taxes applicable to the provision of cable television service:

(B) Franchise fees;

(C) Costs of complying with franchise requirements. including costs of providing public, educational, and governmental access channels as required by the franchising authority;

(D) Retransmission consent fees and copyright fees incurred for the carriage of broadcast signals: and

(E) Other programming costs.

(F) Commission cable television system regulatory fees imposed pursuant to 47 U.S.C. 159.

(v) The permitted charge for a regulated tier shall be adjusted on account of programming costs. copyright fees and retransmission consent fees only for the program channels or broadcast signals offered on that tier.

(vi) The permitted charge shall not be adjusted for costs of retransmission consent fees or changes in those fees incurred prior to October 6, 1994.

(vii) The starting date for adjustments on account of external costs for a tier of regulated programming service shall be the earlier of the initial date of regulation for any basic or cable service tier or February 28, 1994.

(viii) changes in franchise fees Shall not result in an adjustment to permitted charges, but rather shall be calculated separately as part of the maximum monthly charge per subscriber for a tier of regulated programming service.

(ix) Adjustments to permitted charges to reflect changes in the costs of programming purchased from affiliated programmers, as defined in §76.901, shall be permitted as long as the price charged to the affiliated system reflects either prevailing company prices bffered in the marketplace to third parties (where the affiliated program supplier has established such prices) or the fair market value of the Programming.

(x) Adjustments to permitted charges on account of increase in costs of programming shall be further adjusted to reflect any revenues received by the operator from the programmer. Such adjustments shall apply on a channel-by-channel basis.

(xi) In calculating programming expense, operators may add a mark-up of 7.5% for increases in programming costs occurring after March 31,1994, except that operators may not file for or take the 7.5% mark-up on programming costs for new channels added on or after May 15, 1994 for which the operator has used the methodology set forth in paragraph (e)(3) of this section for adjusting rates for channels added to cable programming service tiers. Operators shall reduce rates by decreases in programming expense Plus an additional 7.5% for decreases occurring after May 15, 1994 except with respect to programming cost decreases on channels added after May 15, 1994 for which the rate adjustment methodology in paragraph (e)(3) of this section was used.

(e) *Changes in the number of channels on regulated tiers*—(1) *Generally.* A system may adjust the residual component of its permitted rate for a tier to reflect changes in the number of channels offered on the tier on a quarterly basis. Cable systems shall use FCC Form 1210 (or FCC Form 1211, where applicable) to justify rate changes made on account on changes in the number of channels on a basic service tier ("BST") or a cable programming service tier ("CPST"). Such rate adjustments shall be based on any changes in the number of regulated channels that occurred from the end of the last quarter for which an adjustment was previously made through the end of the quarter that has most recently closed preceding the filing of the FCC Form 1210 (or FCC Form 1211, where applicable). However. when a system deletes channels in a calendar quarter, the system must adjust the residual component of the tier charge in the next calendar quarter to reflect that deletion. Operators must elect between the channel addition rules in Paragraphs (e)(2) and (e)(3) of this section the first time they adjust rates after December 31, 1994, to reflect a channel addition to a CPST that occurred on or after May 15, 1994. and must use the elected methodology for all rate adjustments through December 31, 1991. A system that adjusted rates after May 15, 1994, but before January 1, 1995 on account of a change in the number of channels on a CPST that occurred after May 15, 1994. may elect to revise its rates to charge the rates permitted by paragraph (e)(3) of this section on or after January 1, 1995, but is not required to do so as a condition for using the methodology in paragraph (e)(3) of this section for rate adjustments after January 1, 1995. Rates for the BST will be governed exclusively by paragraph (e)(2) of this section. except that where a system offered only one tier on May 14, 1994. the cable operator will he allowed to elect between paragraphs (e)(2) and (e)(3) of this section as if the tier was a CPST.

(2) *Adjusting Rates* for *increases in the number of channels offered between May 15,1994, and December 31, 1997, on a basic service tier and at the election of the operator on a cable programming service tier.* The following table shall be used to adjust permitted rates for increases in the number of channels offered between May 15, 1994. and December 31. 1997, on a basic service tier and subject to the conditions in paragraph (e)(1) of this section at the election of the operator on a CPST. The entries in the table Provide the cents per channel per subscriber per month by which cable operators will adjust the residual component using FCC Form 1210 (or FCC Form 1211, where applicable).

Average No. of regulated channels	Per-channel adjustment factor	Average No. of regulated channels	Per-channel adjustment factor
7	$0.52	14	0.14
7.5	0.45	14.5	0.13
8	0.40	15–15.5	0.12
8.5	0.36	16	0.11
9	0.33	16.5–17	0.10
9.5	0.29	17.5–18	0.09
10	0.27	18.5–19	0.08
105	0.24	19.5–21.5	0.07
11	0.22	22–23.5	0.06
11.5	0.20	24–26	0.05
12	0.19	26.5–29.5	0.04
125	0.17	30–35.5	0.03
13	0.16	34–46	0.02
135	0.15	46.5–99.5	0.01

In order to adjust the residual component of the tier charge when there is an increase in the number of channels on a tier, the operator shall perform the following calculations:

(i) Take the sum of the old total number of channels on tiers subject to regulation (*i.e.*, tiers that are, or could be, regulated but excluding New Product Tiers) and the new total number of channels and divide the resulting number by two;

(ii) Consult the above table to flnd the applicable per channel adjustment factor for the number of channels produced by the calculations in paragraph (e)(2)(i) of this section. For each tier for which there has been an increase in the number of channels. multiply the per-channel adjustment factor times the change in the number of channels on that tier. The result is the total adjustment for that tier.

(3) *Alternative methodology for adjusting rates for changes in the number of channels offered on a cable programming service tier or a single tier system between May 15, 1994, and December 31, 1997.* This paragraph at the Operator's discretion as set forth in paragraph (e)(1) of this section shall be used to adjust permitted rates for a CPST after December 31, 1994, for changes in the number of channels offered on a CPST between May 15,1994. and December 31,1991. For purposes of this paragraph (e)(3) of this Section, a single tier system may be treated as if it were a CPST.

(i) *operators cap attributable to new channels on all CPSTs through December 31. 1997.* Operators electing to use the methodology set forth in this paragraph may increase their rates between January 1, 1995, and December 31, 1997, by UP to 20 cents per channel, exclusive of Programming Costs. for new channels added tc CPSTs on or after May 15, 1994, except that they may not make rate adjustments totalling more than $1.20 per month. per subscriber

through December 31, 1996, and by more than $1.40 per month, per subscriber through December 31, 1997 (the "Operator's Cap"). Except to the extent that the programming costs of such channels are covered by the License Fee Reserve provided for in paragraph (e)(3)(iii) of this section, programming costs associated with channels for which a rate adjustment is made pursuant to this paragraph (e)(3) of this section must fall within the Operator's cap if the programming costs (including any increases therein) are reflected in rates before January 1, 1997. Inflation adjustments pursuant to §76.922(d)(2) are not counted against the Operator's Cap.

(ii) *Per channel adjustment.* Operators may increase rates by a per channel adjustment of up to 20 cents per subscriber per month, exclusive of programming costs, for each channel added to a CPST between May 15, 1994, and December 31. 1997, except that an operator may take the per channel adjustment only for channel additions that result in an increase in the highest number of channels offered on all CPSTs as compared to May 14, 1994. and each date thereafter. Any revenues received from a programmer, or shared by a programmer and an operator in connection with the addition of a channel to a CPST shall first be deducted from programming costs for that channel pursuant to paragraph (d)(3)(x) of this section and then, to the extent revenues received from the programmer are greater than the programming costs, shall be deducted from the per channel adjustment. This deduction will apply on a channel by channel basis.

(iii) *License fee reserve.* In addition to the rate adjustments permitted in paragraphs (e)(3)(i) and (e)(3)(ii) of this section operators that make channel additions on or after May 15, 1994 may increase their rates by a total of 30 cents per month, per subscriber between January 1, 1995, and December 31,1996, for license fees associated with such channels (the "License Fee Reserve"). The License Fee Reserve may be applied against the initial license fee and any increase in the license fee for such channels during this period. An operator may pass-through to subscribers more than the 30 cents between January 1, 1995, and December 31, 1996, for license fees associated with channels added after May 15, 1994. provided that the total amount recovered from subscribers for such channels, including the License Fee Reserve, does not exceed $1.50 per subscriber. per month. After December 31, 1996. license fees may be passed through to subscribers pursuant to paragraph (d) of this section, except that license fees associated with channels added pursuant to this paragraph (d)(3) of this section will not be eligible for the 1.5% mark-up on increases in programming costs.

(iv) *Timing.* For purposes of determining whether a rata increase counts against the maximum rate increases specified in paragraphs (e)(3)(i) through (e)(3)(iii) of this section, the relevant date shall be when rates are increased as a result of channel additions, not when the addition occurs.

(4) *Deletion of Channels.* When dropping a channel from a BST or CPST. operators shall reflect the net reduction in external costs in their rates pursuant to paragraphs (d)(3) (i) and (ii) of this section. With respect to channels to which the 7.5% mark-up on programming costs applied pursuant to paragraph (d)(3)(xi) of this section. the operator shall treat the mark-up as part of its programming costs and subtract the mark-up from its external costs. Operators shall also reduce the price of that tier by the "residual" associated with that channel. For Channels that were on a BST or CPST on May 14, 1994, or channels added after that date pursuant to paragraph (e)(2) of this section, the per channel residual is the charge for the tier, minus the external cost8 for the tier. and any per channel adjustments made after that date, divided by the total number of channels on the tier minus the number of channels on the tier that received the per channel adjustment specified in paragraph (e)(3) of this section. For channels added to a CPST after May 14, 1994, pursuant to paragraph (e)(3) of this section. the residuals shall be the actual per channel adjustment taken for that channel when it was added to the tier.

(5) Movement of channels between tiers. When a channel is moved from a CPST

or a BST to another CPST or BST. the price of the tier from which the channel is dropped shall be reduced to reflect the decrease in programming costa and residual as described in paragraph (e)(4) of this section. The residual associated with the shifted channel shall then be converted from per subscriber to aggregate numbers to ensure aggregate revenues from the channel remain the same when the channel is moved. The aggregate residual associated with the shifted channel may be shifted to the tier to which the channel is being moved. The residual shall then be converted to per subscriber figures on the new tier, plus any subsequent inflation adjustment. The price of the tier to which the channel is shifted may then be increased to reflect this amount. The Price of that tier may also be increased to reflect any increase in programming cost. An operator may not shift a channel for which it received a per channel adjustment Pursuant to paragraph (e)(3) of this section from a CPST to a BST.

(6) *Substitution of channels on a BST or CPST.* If an operator substitutes a new channel for an existing channel on a CPST or a BST, no per channel adjustment may be made. Operators substituting channels on a CPST or a BST shall be required to reflect any reduction in Programming costs in their rates and may reflect any increase in programming cost8 pursuant to paragraphs (d)(3)(i) and (d)(3)(ii) of this section. If the programming cost for the new channel is greater than the programming cost for the replaced channel. and the operator chooses to pass that increase through to subscribers, the excess shall count against the License Fee Reserve or the Operator Cap when the increased cost is passed through to subscribers. Where an operator substitutes a new channel for a channel on which a 7.5% mark-up on programming cost8 was taken pursuant to paragraph (d)(3)(xi) of this section, the operator may retain the 7.5% mark-up on the license fee of the dropped channel to the extent that it is no greater than 1.5% of programming cost of the new service.

(7) *Headend upgrades.* When adding channels to CPSTs and single-tier systems. cable systems that are owned by a small cable company and incur additional monthly per subscriber headend costs of one full cent or more for an additional channel may choose among the methodologies set forth in paragraphs (e)(2) and (e)(3) of this section. In addition, such systems may increase rates to recover the actual cost of the headend equipment required to add up to seven such channels to CPSTs and single-tier systems. not to exceed $5,000 per additional channel. Rate increases pursuant to this paragraph may occur between January 1, 1995. and December 31, 1997, as a result of additional channels offered on those tiers after May 14, 1994. Headend costs shall be depreciated over the useful life of the equipment. The rate of return on this investment shall not exceed 11.25 percent. In order tc recover costs for headend equipment pursuant to this paragraph, systems must certify to the Commission their eligibility to nse this paragraph, and the level of costs they have actually incurred for adding the headend equip ment and the depreciation schedule for the equipment.

(8) *Sunset* provision. Paragraph (e) of this section sball cease to be effective on January 1, 1998 unless renewed by the Commission.

(f) Permitted charges for a tier shall be determined in accordance with forms and associated instructions established by the Commission.

(g) *Cost of service charge.* (1) For purpose of this section. a monthly cost-of-service charge for a basic service tier or a cable programming service tier is an amount equal to the annual revenue requirement for that their divided by a number that is equal to 12 times the average number of subscribers to that tier during the test year. except that a monthly charge for a system or tier in service less than one year shall be equal to the projected annual revenue requirement for the first 12 months of operation or service divided by a number that is equal to 12 times the projected average number of subscribers during the first 12 months of operation or service. The calculation of the average number of subscribers shall include all subscribers, regardless of whether they receive service at full rates or at discounts.